Supreme Court, U.S.
FILED

94 864 NOV 1 4 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE PHILIP LARSON, Petitioner,

v.

GERALD NUTT, Sheriff, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL F. CROMETT
Counsel of Record
Attorney for Petitioner

E-1314 First National Bank Building
332 Minnesota Street
Saint Paul, MN 55101
(612) 227-5363

QUESTIONS PRESENTED

1. Does the Confrontation Clause require a "rule of necessity," i.e., unavailability of the declarant or an inability to replicate the evidence, which compels the court to consider both the need that the out-of-court statements be admitted and the benefits to the defendant in requiring that the government present the declarant at trial?

2. Is the availability of a witness only relevant for Confrontation Clause purposes where the out-of-court statements offered are former testimony and "irrelevant" in all other circumstances, even where the out-of-court statements are offered under a non-firmly rooted hearsay exception such as the residual exception?

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
TABLE OF AUTHORITIES		iii
I.	OPINIONS BELOW	1
II.	JURISDICTION	2
III.	CONSTITUTIONAL PROVISIONS	4
IV.	STATUTES/RULES INVOLVED	5
V.	STATEMENT OF THE CASE	5
VI.	REASONS FOR GRANTING THE WRIT:	
A.	THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS--THAT THE AVAILABILITY OF A DECLARANT, WHOSE OUT-OF-COURT STATEMENTS ARE ADMITTED UNDER THE RESIDUAL OR CATCH-ALL EXCEPTION TO THE HEARSAY RULE, IS "IRRELEVANT" FOR PURPOSES OF THE CONFRONTATION CLAUSE--IS AN ISSUE OF NATIONWIDE IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT	10

B. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT 19

VII. CONCLUSION 25

APPENDIX

A. Judgment of the Eighth Circuit Court of Appeals Denying the Writ of Habeas Corpus (A1 - A2)

B. Per Curiam decision of the United States Court of Appeals for the Eighth Circuit, September 1, 1994 (B1 - B7)

C. Order of District Court denying application for a writ of habeas corpus (C1 - C2)

D. Report and Recommendation of the Magistrate Judge (D1 - D12)

E. Petitioner's Objections to Magistrate's Report and Recommendation (E1 - E10)

F. Statutes/Rules Involved: Minn. Stat. § 595.02, subd. 3; Rule 803 (24), Minn. R. Evid. (F1 - F4)

TABLE OF AUTHORITIES

	Page
UNITED STATES SUPREME COURT:	
Coy v. Iowa, 487 US 1012 (1988)	7
Green v. California, 399 US 149, 158 (1970)	21
Idaho v. Wright, 497 U.S. ___, 110 S. Ct. 3139 (1990)	passim
Larson v. Minnesota, ___ U.S. ___, 111 S.Ct. 29 (1990)	2
Mattox v. United States, 156 US 237, 242-3 (1895)	20
Ohio v. Roberts, 448 US 56 (1980)	12, 21
United States v. Inadi, 475 US 387 (1986)	22
White v. Illinois, ___US___, 112 SCt 736 (1992)	passim
UNITED STATES COURT OF APPEALS:	
Larson v. Nutt, 34 F3d 647 (8th Cir. 1994)	passim
Lowery v. Collins, 988 F2d 1364, 1369-70 (5 Cir. 1993)	14

People of Territory of Guam v. Ignacio, 10 F3d 608, 611 & n. 1 (9 Cir. 1993) 15

Ring v. Erickson, 983 F2d 818, 819 (8th Cir. 1992) 9, 12-13

Seigfriedt v. Fair, 982 F2d 14, 16-7 & n. 2 (1 Cir. 1992) 15

Swan v. Peterson, 6 F3d 1373, 1379 & n.2 (9 Cir. 1993) 16

United States v. Accetturo, 966 F2d 631, 634 & n. 6 (11 Cir. 1992) 14

United States v. Jacoby, 955 F2d 1527, 1538 (11 Cir. 1992) 14

United States v. Johnson, 971 F2d 562, 572 (10 Cir. 1992) 14

United States v. Joseph, 964 F.2d 1380 (3 Cir. 1992) 14

MINNESOTA DECISIONS:

State v. Larson, 472 N.W.2d 120 (Minn. 1991) cert. denied 112 SCt 965 (1992) 2

State v. Larson, 453 N.W.2d 42 (Minn. 1990) cert. granted remanded Larson v. Minnesota, ___ U.S. ___, 111 S.Ct. 29 (1990) 2

State v. Larson, 447 N.W.2d 593 (Minn. Ct. App. 1989) 2

UNITED STATES CONSTITUTION:

Amendment VI 4

Amendment XIV 4

FEDERAL STATUTES:

28 U.S.C. §1254 (1) 4

MINNESOTA RULES AND STATUTES:

Minn. Stat. § 595.02, subd. 3 5

Rule 803 (24), Minn. R. Evid. 5

OTHER:

Ass'n of Public School Employees v. Lakewood Board, 624 NE2d 1043, 1047 (Ohio 1994) 15

Barnett v. State, 440 SE2d 247-8 (Ga. App. 1994) 15

Chapman v. State, 628 A2d 676, 686-7 (Md. 1993) 15, 17-18, 22

Comm. v. Crawford, 629 NE2d 1332, 1335 (Mass. 1994) 15

Franco v. State, 866 P2d 247, 253 (Nev. 1993) 14

People v. March, 620 NE2d 424, 433 (Ill. App. 4 Dist. 1993) 13

State v. McGriff, 871 P2d 782, 790 (Hawaii 1994) 14

State v. Poole, 859 P2d 944, 946 (Idaho 1993) 13

State v. Shoop, 622 NE2d 665, 671-2 (Ohio App. 3 Dist. 1993) 13

State v. Wicker, 832 P2d 127 (Wash. App. 1992) 16-17

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Bruce Philip Larson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled matter on September 1, 1994.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's denial of a writ of habeas corpus is Larson v. Nutt, 34 F3d 647 (8th Cir. 1994); see Appendix B.

The other reported decisions in this

case are as follows: State v. Larson, 472 N.W.2d 120 (Minn. 1991) cert. denied 112 SCt 965 (1992); State v. Larson, 453 N.W.2d 42 (Minn. 1990) cert. granted remanded Larson v. Minnesota, ____ U.S. ____, 111 S.Ct. 29 (1990); State v. Larson, 447 N.W.2d 593 (Minn. Ct. App. 1989).

II.

JURISDICTION

After a jury trial, petitioner was convicted of a single act of criminal sexual conduct in the second degree and filed a timely appeal.

The Minnesota Court of Appeals found a constitutional violation. The Minnesota Supreme Court reversed and affirmed the conviction. This Court then granted a Petition for a Writ of Certiorari,

vacated the judgment, and remanded the case for further consideration in light of Idaho v. Wright, 497 U.S. ____, 110 S. Ct. 3139 (1990). The Minnesota Supreme Court again affirmed the conviction and this Court denied a petition for writ of certiorari to review that decision.

Petitioner then filed an application for a Writ of Habeas Corpus in United States District Court for the District Court of Minnesota. The writ was denied. Petitioner appealed that decision to the United States Court of Appeals for the Eighth Circuit which affirmed the denial of the petition for a writ of habeas corpus.

This Court has jurisdiction to review the decision of the judgment of the United States Court of Appeals for the Eighth Circuit by Writ of Certiorari pursuant

to section 1254 (1), Title 28, U.S.C.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

SECTION ONE, UNITED STATES CONSTITUTION AMENDMENT XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV.

STATUTES/RULES INVOLVED

Minn. Stat. § 595.02, subd. 3; Rule 803 (24), Minn. R. Evid. See Appendix F.

V.

STATEMENT OF THE CASE

On November 2, 1987, petitioner was charged in Martin County (Minnesota) District Court with a single count of criminal sexual conduct in the first degree (multiple acts of penetration over an extended period of time) involving his daughter. The charge first arose amidst petitioner's divorce and child custody dispute in May, 1987. Family court proceedings were immediately initiated, and petitioner's visitation with his child was later resumed. When charges were brought,

petitioner asserted his innocence and maintained that the conduct did not occur or was committed by someone else.

Before trial, the state gave notice that it intended to introduce four out-of-court statements made by the child: (1) May 1, 1987 to a physician's assistant; (2) May 7, 1987 to a police officer and child protection worker; (3) October, 1987 to a therapist; and (4) November 24, 1987 a videotaped interview by police and child protection worker. The statements were offered under Minn. Stat. § 595.02, subd. 3, which required, among other things, that the child either testify or be unavailable. After a hearing challenging admission of the statements as a violation of the Sixth Amendment right of confrontation, the trial court, assuming the child was incompetent

for purposes of the hearing, ruled the statements were admissible. The court reconsidered its ruling in light of Coy v. Iowa, 487 US 1012 (1988), and allowed three of the out-of-court statements to be admitted assuming that the child was incompetent. Petitioner noted a continuing constitutional objection to the out-of-court statements.

Immediately prior to trial, the court held a competency hearing and found the child, who was then five years old, to be competent to testify. **THE STATE DID NOT CALL THE CHILD AS A WITNESS BUT INSTEAD SUBSTITUTED THE OUT-OF-COURT STATEMENTS FOR HER LIVE TESTIMONY.** In light of the court's ruling admitting the three out-of-court statements, petitioner waived his objection to the fourth videotaped

statement which the state then also played during its case in chief.

Petitioner testified and offered the testimony of ten character witnesses. On September 3, 1988, the jury found petitioner guilty of a lesser offense, criminal sexual conduct in the second degree involving a single act of sexual contact. Petitioner was sentenced on November 14, 1988, and the sentence was later corrected to a term of 21 months in prison, execution stayed and petitioner was placed on probation.

After exhausting his state court remedies, where the court focused on the admissibility of the statements under the Minnesota Rules of Evidence, including the catch-all exception, petitioner filed a petition for a writ of habeas corpus in the

District Court for the District of Minnesota alleging he was convicted in violation of his Sixth Amendment right of confrontation where hearsay, which did not fit any of the firmly rooted exceptions to the hearsay rule, of an available witness was admitted even though the witness did not testify. The District Court denied the writ.

Petitioner appealed from this decision to the United States Court of Appeals for the Eighth Circuit. That Court affirmed the decision denying the petition for a writ of habeas corpus. Larson v. Nutt, 34 F3d 647 (8th Cir. 1994). The per curiam decision stated:

> . . . According to Larson, an available, nontestifying witness's out-of-court statements may be admitted only when the out-of-court statements fit a

> firmly rooted exception to the hearsay rule and his daughter's statements do not fit any firmly rooted hearsay exception.
>
> We disagree with Larson's premise. "[W]hether [Larson's daughter] was available is irrelevant for purposes of the [Confrontation] Clause." Ring v. Erickson, 983 F2d 818, 819 (8th Cir. 1992). . . . Id. at 647-8.

The decision went on to state: "Larson's argument is foreclosed by White (v. Illinois), (Idaho v.)Wright, and Ring."

VI.

REASONS FOR GRANTING THE WRIT:

A. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS--THAT THE AVAILABILITY OF A DECLARANT, WHOSE OUT-OF-COURT STATEMENTS ARE ADMITTED UNDER THE RESIDUAL OR CATCH-ALL EXCEPTION TO THE HEARSAY RULE, IS "IRRELEVANT" FOR PURPOSES OF THE CONFRONTATION CLAUSE--IS AN ISSUE OF NATIONWIDE IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT

Despite this Court's clear analysis

and holding in White v. Illinois, ___US___, 112 SCt 736 (1992), many federal and state courts have disagreed about the decision. Petitioner's case provides this Court with an opportunity to resolve the question of whether White abolished consideration of availability and end the confusion and disagreement about the fundamental principles of the Confrontation Clause.

In White, this Court held that the Confrontation Clause of the Sixth Amendment did not require a showing of unavailability for admission of out-of-court statements which met a firmly rooted exception to the hearsay rule and found that exceptions for spontaneous utterances and medical examination were firmly rooted. This Court did not decide whether production of a witness or a showing of unavailability was

required for hearsay exceptions which were not firmly rooted, like the catch-all or residual exceptions. See Idaho v. Wright, supra, (residual exception is not firmly rooted exception).

The conflicting interpretations of the decision in White apparently arise because some courts have focused on the holding set forth above while others have focused on broader language in the opinion. Some courts have read the discussion of Ohio v. Roberts, 448 US 56 (1980), and concluded that unavailability is only an issue in cases involving statements made during a prior judicial proceeding.

The Eighth Circuit based its ruling in petitioner's case--that for purposes of the Confrontation Clause the declarant's availability "is irrelevant"--upon dicta

from a previous decision.

> . . . (W)e now know that whether (the declarant) was available is irrelevant for purposes of the (Confrontation) Clause. The Supreme Court recently held in White v. Illinois, . . . , that unavailability of the declarant is not constitutionally required. Ring v. Erickson, 983 F2d 818, 819-20 (8 Cir. 1992).

Cf. Larson v. Nutt, 34 F3d 647 (8 Cir. 1994). Since the court in Ring granted the writ because it found no "particularized guarantees of trustworthiness," the casual reference to availability was unnecessary.

A number of state court decisions have read this Court's decision in White in a similarly overbroad manner, see State v. Poole, 859 P2d 944, 946 (Idaho 1993); People v. March, 620 NE2d 424, 433 (Ill. App. 4 Dist. 1993); State v. Shoop, 622 NE2d 665, 671-2 (Ohio App. 3 Dist. 1993),

or have read the decision in only a slightly narrower manner, only former testimony requires unavailability. See State v. McGriff, 871 P2d 782, 790 (Hawaii 1994); Franco v. State, 866 P2d 247, 253 (Nev. 1993). See also Larson v. Nutt, 34 F3d 647 (8 Cir. 1994).

Other federal courts have expressed disagreement with this position, instead reading the White holding to the issue decided by this Court: unavailability is not necessary where the out-of-court statements are the firmly rooted exceptions for spontaneous utterances and medical examination. See e.g., United States v. Johnson, 971 F2d 562, 572 (10 Cir. 1992); United States v. Jacoby, 955 F2d 1527, 1538 (11 Cir. 1992), United States v. Accetturo, 966 F2d 631, 634 & n. 6 (11 Cir. 1992);

United States v. Joseph, 964 F.2d 1380 (3 Cir. 1992); Lowery v. Collins, 988 F2d 1364, 1369-70 (5 Cir. 1993). See also Seigfriedt v. Fair, 982 F2d 14, 16-7 & n. 2 (1 Cir. 1992)("no need to ponder the import of the dictum" in White). Many state courts have accepted this interpretation of White. See Ass'n of Public School Employees v. Lakewood Board, 624 NE2d 1043, 1047 (Ohio 1994); Comm. v. Crawford, 629 NE2d 1332, 1335 (Mass. 1994); Barnett v. State, 440 SE2d 247-8 (Ga. App. 1994); Chapman v. State, 628 A2d 676, 686-7 (Md. 1993).

There is disagreement between judges on the Ninth Circuit Court of Appeals on this issue. In People of Territory of Guam v. Ignacio, 10 F3d 608, 611 & n. 1 (9 Cir. 1993), a panel of judges stated: "... White v. Illinois, ... does away with the

unavailability requirement." Another panel of the same court stated: "We have no reason to decide whether White v. Illinois, . . . limits the unavailability requirement to cases involving the admission of prior testimony." Swan v. Peterson, 6 F3d 1373, 1379 & n.2 (9 Cir. 1993).

Two state court decisions reflect the truest application of this Court's decision in White. In State v. Wicker, 832 P2d 127 (Wash. App. 1992), the court was faced with hearsay--an uncalled witness "verified" a fingerprint examiner's conclusion--which did not meet any firmly rooted exception to the hearsay rule. The decision acknowledged that White may have limited unavailability to former testimony, and then went on:

Nonetheless, because in-court

> testimony would provide a meaningful addition to the truth finding process in the case at bar, we find that the confrontation clause requires that unavailability be shown before the out-of-court statement may be admitted. State v. Wicker, 832 P2d 127, 130 & n. 7 (Wash. App. 1992).

In Chapman v. State, 628 A2d 676 (Md. 1993), the court addressed a state statute that allowed bank records to be admitted in check dishonor cases without a bank employee testifying. The court found that the confrontation clause did not require witness unavailability because there was limited utility to cross-examination in that situation and there was a substantial burden to the banks. Id. at 688-9. The court reasoned:

> With Inadi and White, it appears that the Supreme Court has emphasized that Roberts contemplated a rule of necessity,

> not one of unavailability. (citations omitted). In both Inadi and White, the Court focused on the necessity of admitting at trial the type of out-of-court statement, and whether that need was outweighed by the benefits to the criminal defendant of requiring the government to present the out-of-court declarant. Furthermore, the Inadi Court even recast Roberts in terms of necessity. It made clear that where both live testimony and hearsay are available to prove the identical point, the Confrontation Clause favors production of the live testimony at trial, rather than permitting what is most convenient for the government to produce. Id. at 687-8.

These courts applied the analysis this Court used in White and Inadi to reach sound decisions about constitutional requirements in hearsay which does not fit any firmly rooted exception.

The spectrum of cases make it clear that the issue presented in petitioner's

case is a recurring one of national significance, involving a major disagreement about the rule of law. Review of petitioner's case by this Court could resolve this important national issue.

B. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

The decision of the Eighth Circuit Court of Appeals in petitioner's case conflicts with many significant Sixth Amendment decisions and principles set out by this Court. This Court should review petitioner's case to eliminate these significant conflicts which undermine the very purpose and meaning of the Confrontation Clause.

(i) Purpose of Clause.

The purpose of the Confrontation Clause was to

> prevent depositions or ex parte affidavits . . . from being used against the prisoner . . . in lieu of a person examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Mattox v. United States, 156 US 237, 242-3 (1895).

The similarities between the types of out-of-court statements offered against petitioner and those traditionally excluded by the Confrontation Clause, depositions, letters, and affidavits, were ignored by the court.

(ii) Preference for live testimony.

In White v. Illinois, supra at 743, this Court again reiterated the long recognized preference for live testimony. Out-of-court statements may be admitted "as long as the declarant is testifying as a witness and subject to full and effective cross-examination," "the greatest legal engine ever invented for the discovery of the truth." Green v. California, 399 US 149, 158 (1970). The Court of Appeals overlooked this constitutional preference.

(iii) Rule of necessity rather than unavailability.

In Ohio v. Roberts, supra, this Court stated that the Sixth Amendment required a "rule of necessity." Since then, this rule has been incorrectly transformed into the rule of unavailability. Revisiting the

requirement of the "rule of necessity," which is what this Court has done in White, is a return to the proper constitutional standard. See e.g., Chapman v. State, 628 A2d 676, 688-9 (Md. 1993). The Court of Appeals did not consider petitioner's claim that there was no "necessity" in this case.

(iv) Analysis in White and Inadi. In harmony with the "rule of necessity," this Court decided that only where the out-of-court statements could not be replicated by live testimony and cross-examination would add little to the reliability of the statements is an out-of-court statement necessary and the preference for live testimony overcome. White v. Illinois, supra; United States v. Inadi, 475 US 387 (1986). Because of the diversity of hearsay which may be offered under the

residual, catch-all exception, it is clear that, unlike firmly rooted exceptions, there may not be a simple rule on admissibility. Courts would be required to analyze the specific type of hearsay before it in terms of the White "rule of necessity" analysis, and consider the availability of the witness among other factors, to reach a conclusion regarding the constitutional requirements for admissibility. The Court of Appeals ignored these considerations.

(v) Residual exception is not firmly rooted exception.

In Idaho v. Wright, supra, this Court noted that the residual exception to the hearsay rule is not a firmly rooted exception.

(vi) This Court reserved the issue of unavailability where hearsay is offered under a residual exception.

In Idaho v. Wright, supra, this Court specifically reserved the issue of whether unavailability was required when the hearsay was offered under a residual exception to the hearsay rule. The Court of Appeals ignored this important point.

The conflict between this Court's rulings on the requirements of the Confrontation Clause and the decision of the Eighth Circuit is so significant that the Court should grant review of the decision in petitioner's case.

CONCLUSION

Because the decision of the Court of Appeals for the Eighth Circuit is one based on a fundamental issue of nationwide importance, which has produced conflict among many courts, and one which misapplied many essential Confrontation Clause principles of this Court's decisions, a writ of certiorari should issue to review its decision in this matter.

Respectfully submitted,

Michael F. Cromett
Counsel of Record
Attorney for Petitioner

E-1314 First Nat'l Bank Bldg
322 Minnesota Street
Saint Paul, MN 55101
(612) 227-5363

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 94-1052MNMI

Bruce Philip Larson, Appellant, vs. Gerald Nutt, Sheriff, Martin County, Appellee.	* Appeal fron the * United States * District Court * for the District * of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of

this Court.

September 1, 1994

A trur copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

MANDATE ISSUED 9/23/94

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1052 MN

Bruce Philip Larson,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	District Court
	*	for the District
Gerald Nutt, Sheriff,	*	of Minnesota.
Martin County,	*	
	*	
Appellee.	*	

Submitted: June 16, 1994

Filed: September 1, 1994

Before FAGG, Circuit Judge, ROSS, Senior Circuit Judge, and BEAM, Circuit Judge.

PER CURIAM.

The State of Minnesota charged Bruce Philip Larson with criminal sexual contact with his three-year-old daughter. Larson's daughter was available at his trial and the trial court found the child, then age five, competent to testify, but neither the State nor Larson called her as a witness. Overruling Larson's hearsay and Confrontation Clause objections, the trial court admitted evidence of the child's out-of-court statements to a physician's assistant, to a child protection specialist, to a therapist, and to a police officer and a social worker. A jury found Larson guilty and the Minnesota Supreme Court affirmed his conviction. State v. Larson, 472 NW2d 120 (Minn. 1991) cert.

denied 112 SCt 965 (1992). Larson filed a 28 USC § 2254 petition, claiming his conviction was obtained in violation of his Sixth Amendment confrontation right. The district court denied Larson's petition.

Larson appeals, contending the Confrontation Clause does not allow admission of his daughter's out-of-court statements because she was available but did not testify. According to Larson, an available, nontestifying witness's out-of-court statements may be admitted only when the out-of-court statements fit a firmly rooted exception to the hearsay rule and his daughter's statements do not fit any firmly rooted hearsay exception.

We disagree with Larson's premise. "[W]hether [Larson's daughter] was

unavailable is irrelevant for purposes of the [Confrontation] Clause." Ring v. Erickson, 983 F2d 818, 819 (8th Cir. 1992); see White v. Illinois, 112 SCt 736, 741 (1992)(availability analysis necessary only when challenged out-of-court statement was made in earlier judicial proceeding). The relevant inquiry is whether the out-of-court statements "'bear[] adequate "indicia of reliability."'" Ring, 983 F2d at 820 (quoting Idaho v. Wright, 497 US 805, 815 (1990)). The reliability requirement is met either when the out-of-court statement fits a firmly rooted hearsay exception of "by 'a showing of particularized guarantees of trustworthiness.'" Ring, 983 F2d at 820 (quoting Wright, 497 US at 816).

In affirming Larson's conviction, the

Minnesota Supreme Court considered whether the challenged statements had particular guarantees of trustworthiness. Larson, 472 NW2d at 126-28. Except for the child's statement to a police officer and a social worker, the Minnesota court concluded the statements were sufficiently reliable for Confrontation Clause purposes. Id. The Minnesota court also concluded admission of a videotape of the child's statement to a police officer and a social worker was harmless error beyond a reasonable doubt. Id. at 128.

Larson's habeas petition did not challenge the Minnesota court's conclusion that three of the out-of-court statements had particular guarantees of trustworthiness. In any event, Larson's

skeletal assertion that "there were no circumstantial guarantees of trustworthiness surrounding the making of the statements," buried in a brief point discussing the benefits of cross-examination, does not raise this issue on appeal. See United States v. Dunkel, 927 F2d 955, 956 (7th Cir. 1991). Larson's sole argument on appeal is that only out-of-court statements fitting firmly rooted hearsay exceptions may be admitted without a showing of unavailability. Larson's argument is foreclosed by White, Wright, and Ring. We thus need not address Larson's assertion that his daughter's statements do not meet any firmly rooted hearsay exception.

We agree with the Minnesota Supreme

Court that the child's videotaped statement to a police officer and a social worker was merely cumulative and its admission was at most harmless error. Indeed, Larson waived his Constitutional Clause objection to the videotape before trial, asking the trial court to overrule its earlier suppression order. We thus conclude Larson has failed to show admission of his daughter's out-of-court statements violated his Sixth Amendment confrontation right.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-92-456

Bruce Philip Larson,

Plaintiff,

v. ORDER

Gerald Nutt, Sheriff,
Martin County,

Defendant.

This matter is before the court upon plaintiff's objections to a Report and Recommendation of United States Magistrate Judge Floyd E. Boline dated October 22, 1993. Plaintiff objects to the magistrate Judge's recommendation that his application for a writ of habeas corpus be denied.

Based upon a de novo review of the record herein, the court adopts the magistrate judge's Report and Recommendation dated October 22, 1993.

Accordingly, IT IS HEREBY ORDERED that: plaintiff's application for a writ of habeas corpus is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 23, 1993

/s/ Daid S. Doty

David S. Doty, Judge

United States District Court

UNITED STATES COURT OF APPEALS
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-92-456

Bruce Philip Larson,

Petitioner,

v. REPORT AND RECOMMENDATION

Gerald Nutt, Sheriff,
Martin County,

Respondent.

Before the Court is petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254. This matter was referred to the undersigned United States Magistrate Judge for Report and Recommendation under 28 U.S.C. § 636 and D. Minn. Local Rule 72.1 For the reasons set forth below, it is recommended that petitioner's application be denied.

BACKGROUND

Petitioner is currently subject to a

state sentence for his 1988 conviction on a charge of Second Degree Criminal Sexual Conduct.[1] The facts and circumstances surrounding petitioner's conviction are recounted in State v. Larson, 472 N.W2d 120, 122-23 (Minn. 1991), cert. denied, 112 U.S. 965 (1992).[2] The facts of this case are not in dispute.

Petitioner filed this petition for writ of habeas corpus on May 11, 1992 and alleged a single claim: that four out-of-court statements were admitted at trial in violation of his federal constitutional rights under the Confrontation Clause of the Sixth amendment. See Petition, Docket

---

[1] Petitioner received a stayed sentence of 21 months imprisonment and was placed on probation for ten years on condition that he also serve six months in a county jail.

No. 1, at (para.) 12 (A). Petitioner's counsel submitted a lengthy brief in support of this claim. The essence of petitioner's claim is that his right of confrontation was violated because the person who made the four out-of-court statements - petitioner's young daughter, the victim of the offense - was available and competent to testify, but was not called as a witness by the prosecution. Petitioner argues, based upon the Supreme Court's recent decision in White v. Illinois, 112 S.Ct. 965 (sic)(1992), that

---

[2] Petitioner's conviction was also the subject of other judicial decisions before it was ultimately affirmed. See State v. Larson, 447 N.W.2d 593 (Minn. App. 1989), aff'd, 453 N.W.2d 42 (Minn. 1990), cert. granted, judgment vacated, and case remanded sub nom. Larson v. Minnesota, 111 S.Ct. 29 (1990).

the Confrontation Clause is violated by the admission of hearsay which does not fall within a "firmly rooted" exception where the declarant is available but does not testify. See Petitioner's Brief in Support, Docket No. 1, at 10-11.

DISCUSSION

In habeas corpus proceedings, a federal court has the power to examine federal constitutional issues even after trial and review by the state courts. See Wainwright v. Sykes, 435 U.S. 72, 87 (1977). However, a federal court may only intervene in state judicial processes to correct wrongs of a constitutional dimension. See Wycoff v. Nix, 869 F.2d 1111, 1113 (8th Cir. 1989). Thus, a federal court is limited in a habeas proceeding to determining whether or not

there has been a violation of petitioner's constitutional rights, or whether the alleged error was so prejudicial that it denied the petitioner due process. Id.; see Mercer v. Armontrout, 844 F.2d 582, 587 (8th Cir. 1988). A habeas petitioner bears the burden of establishing his right to relief. A state court's factual findings are entitled to a presumption of correctness unless the petitioner can show a denial of due process. See Sumner v. Mata, 455 U.S. 591, 597 (1982); 28 U.S.C. § 2254 (d).

In this case petitioner has not challenged any factual findings by the state courts. Petitioner contends only that his right of confrontation was violated as a matter of law because the declarant who made the hearsay statements

was available, but was not called to testify by the prosecution. This Court finds that petitioner's claim is foreclosed by controlling precedents.

The United States Court of Appeals recently addressed the meaning and scope of the Confrontation Clause in Ring v. Erickson, 968 F.2d 769 (8th Cir. 1992), a case which originated in this Court. In Ring, which was decided shortly after the Supreme Court issued its opinion in White v. Illinois, the court summarized the present state of Confrontation Clause jurisprudence as follows:

> The Confrontation Clause does not bar the use of all out-of-court statements. Additionally, we now know that whether C.R. was unavailable is irrelevant for purposes of the clause. The Supreme Court recently held in White v. Illinois, ____U.S.____, 112 S.Ct. 736, 116 L.Ed.2d 848

(1992), that unavailability of the declarant is not constitutionally required. What the Constitution does require, however, is that the hearsay statements "bear[] adequate 'indicia of reliability.'" Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 3146, 111 L.Ed.2d 638 (1990). The Wright Court held, citing Ohio v. Roberts, 448 US 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), that the reliability requirement can be met in either or two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'" 110 S.Ct. at 3147. "'[P]articularized guarantees of trustworthiness' must be shown from the totality of the circumstances." Id. at 3148. The only circumstances which are relevant, however, are those surrounding the making of the statement, not corroborative evidence of the act. Id.

Ring, 968 F.2d at 762 (emphasis added).

In this case, petitioner's challenge to his conviction is predicated entirely upon the fact that the declarant was

available to testify, but was not called as a witness by the state. Under Ring, which this Court is bound to follow, the availability of the declarant is "irrelevant" to any analysis of petitioner's rights under the Confrontation Clause.[3] Ring, 968 F.2d at 762. The

---

[3] The Court notes that petitioner's argument, while well-crafted, appears to suffer in part from the fallacy of inverse reasoning. Petitioner correctly states the holding of White: availability of the declarant is not required where hearsay is admitted under a 'firmly rooted' hearsay exception. Petitioner's logic fails when he then goes on to argue that White stands for the proposition that availability is required where hearsay is not admitted under a 'firmly rooted' exception. There is, however, some support for petitioner's position. See Larson, 472 N.W.2d at 128-131 (dissenting opinion of Justice Tomljanovich). Importantly, the United States Supreme Court declined to review Larson despite Justice Tomljanovich's dissenting opinion.

petition for writ of habeas corpus must therefore be denied.

Petitioner makes no claim that the admission of the four hearsay statements at his trial was not supported by a showing of "particularized guarantees of trustworthiness." Wright, 110 S.Ct. at 3147. In reaffirming petitioner's conviction, the Minnesota Supreme Court discussed this question at length and held that the "key hearsay evidence in this case, B.'s statements to the medical assistant . . . possessed particular guarantees of trustworthiness." Larson, 472 N.W.2d at 126. The court went on to set forth seven factors that, in its view, established the trustworthiness of this first statement. Id. The court then concluded that two of the other three hearsay statements were also sufficiently

reliable for confrontation clause purposes; that the three other statements were "largely cumulative evidence" and were also admissible for the non-hearsay purpose of showing that the victim's allegations were consistent; and that "any error in admitting the subsequent other statements as substantive evidence of guilt was harmless beyond a reasonable doubt." id. at 126-8. Had petitioner raised the issue, this Court would conclude that these determinations by the Minnesota Supreme Court were correct and were not "wrongs of a constitutional dimension." Wycoff v. Nix, 869 F.2d at 1113.[4]

---

[4] The Court notes that the Supreme Court has recently adopted a less rigorous harmless error standard for habeas corpus cases. See Brecht v. Abrahamson, 113 S.Ct. 1710, 1713 (1993)(error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."). The Minnesota Supreme Court

In summary, petitioner's sole claim- that the Confrontation Clause was violated because hearsay was admitted even though the declarant was available to testify at trial - is foreclosed by the controlling precedents of White and Ring. As this Court has no license to reconsider those precedents, the petition for writ of habeas corpus should be denied.

RECOMMENDATION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for writ of habeas corpus be denied.

/s/ Floyd E. Boline
FLOYD E. BOLINE
UNITED STATES MAGISTRATE JUDGE

---

4 con't
found admission of three of the four hearsay statements was "harmless beyond a reasonable doubt," the test set forth in Chapman v. California, 386 U.S. 18, 24 (1967).

Dated: October 22, 1993

Pursuant to Local Rule 72.1(c)(2) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by November 5, 1993, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure shall operate as a forefeiture of the objecting party's right to seek review in the Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-92-456

Bruce Philip Larson,

Petitioner,

vs. PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Sheriff Gerald Nutt,

Respondent.

Petitioner, Bruce Philip Larson, through counsel, enters the following objections to the magistrate's Report and Recommendation filed in the above-entitled case:

1. Petitioner objects to the conclusion that denial of the writ is required by the decision in White v. Illinois, ____US____, 112 SCt 736 (1992). Report and Recommendation at 3-4, 6.

The holding and analysis in White was limited to "firmly rooted" exceptions to the hearsay rule, (the medical exception and excited utterances exception), for which unavailability is not constitutionally required. The question raised by petitioner -- whether unavailability is constitutionally required for exceptions to the hearsay rule which are not "firmly rooted" exceptions -- was not decided by White. The analysis and reasoning used by the Court in White strongly suggest that unavailability is required when hearsay is admitted under

exceptions which are not firmly rooted.[1]

In White, the Supreme Court reviewed the recent developments of the unavailability rule. In Inadi v. United States, 475 US 387 (1986), the Supreme Court held that the Roberts (prior testimony) unavailability rule did not apply to co-conspirator statements because (a) the evidentiary value of the statements could not be replicated even if the declarant were available and testified in court, and (b) there would be little benefit and substantial cost to imposing a requirement of unavailability. In White,

[1] Contrary to the Report and Recommendation at 4 n. 3, petitioner's conclusion, that under White the out-of-court statements in this case are inadmissible, is based on logic of the Supreme Court's decision in White. See Brief in Support of Petition for Writ of Habeas Corpus at 11.

the Court then went on to apply this same analysis to "firmly rooted" exceptions to the hearsay rule and found there was no reason for a requirement of unavailability in that context. White v. Illinois, supra at 741-3.

Before the conclusion that unavailability is irrelevant for purposes of the Confrontation Clause can be reached, the White/Inadi replication/benefit analysis must be applied to the hearsay is not offered under "firmly rooted" exceptions, like the so-called catch-all exception. Idaho v. Wright, 497 US ___, 110 SCt 3139, 3147 (1990)(catch-all is not

"firmly rooted" exception).[2] The reasons for not requiring unavailability in Inadi and White do not apply to hearsay under the catch-all exception or other hearsay which

---

[2] Total elimination of unavailability would result in virtual elimination of the Confrontation Clause's role in restricting hearsay testimony, an outcome rejected in White. See White v. Illinois, supra at 740. In nearly every case, a claim of "particularized guarantees of trustworthiness" could be offered and accepted, thus virtually eliminating true confrontation from trials in most criminal cases and replacing live testimony with professional witnesses. The result suggested by language in Ring and in the Report and Recommendation goes even further than the position urged by the government in support of a very narrow application of the clause in White. Even under that narrower application urged in White, the Confrontation Clause would still apply to cases where the statements were made for the principal purpose of accusing or incriminating the defendant. Id. at 740-1. The statements in petitioner's case were made primarily for purposes of incriminating or accusing him and would be inadmissible even under the narrower rule proposed and rejected in White.

does not fit a "firmly rooted" exception. Unavailability is constitutionally required in those situations.

2. Petitioner objects to the conclusion that denial of the writ is required by the decision in Ring v. Erickson, 968 F2d 760 (1992) aff'd 983 F2d 818 (8 Cir. 1993). Report and Recommendation at 3-4, 6.

The court in Ring held that statements made to a doctor did not fall within the "firmly rooted" medical exception to the hearsay rule and that those statements and statements made to a social worker were not supported by "particularized guarantees of trustworthiness." Id. at 762-3.

Authority for the statement in Ring that White held that unavailability "is irrelevant for purposes of the"

Confrontation Clause, see Ring v. Erickson, supra at 968 F2d 762 and Report and Recommendation at 3-5, cannot be found in the White decision or its analysis and is incorrect. See Petitioner's Objection No. 1. Given the decision in Ring, this language about unavailability was unnecessary to the holding and constitutes dicta which does not foreclose a ruling in petitioner's favor on this issue in this case.[3]

---

[3] The child in Ring, who was three years old at the time of the hearsay statements, was found to be incompetent at trial. Ring v. Erickson, supra at 761. Since the court granted the writ on the basis of the failure to establish "particularized guarantees of trustworthiness," the questions of whether unavailability was constitutionally required and if so, whether incompetency constituted unavailability were unnecessary to the decision.

3. Petitioner objects to the conclusion that he has not challenged any of the factual findings of the state courts. Report and Recommendation at 3. Petitioner maintains that the statements to the physician's assistant were not admissible under the medical exception because, as in Ring, the primary rationale for the reliability of such statements was absent: the three year old child did not know that false statements could lead to a false diagnosis and the child also said "just kidding" after making the statements. See Brief in Support of Petition for Writ of Habeas Corpus at 13-4. Because this hearsay did not fit a "firmly rooted" exception, admission without showing unavailability violated petitioner's right to confrontation.

4. Petitioner objects to the suggestion that the four statements were supported by "particularized guarantees of trustworthiness." Report and Recommendation at 5. The state court found that the last statement was not supported by "particularized guarantees of trustworthiness" and should not have been admitted. State v. Larson, 472 NW2d 120, 126-8 (Minn. 1991).

5. Petitioner objects to the implication that a prior denial of a petition for certiorari by the United States Supreme Court can be interpreted as speaking to the merits. Report and Recommendation at 4 n. 3. See Brown v. Allen, 344 US 443, 489-97 (1953).

6. Petitioner objects to the magistrate's recommendation that his

application for a writ of habeas corpus be denied. See Report and Recommendation at 1, 4, 6.

RESPECTFULLY SUBMITTED,

_____

Dated: October 31, 1993

MICHAEL F. CROMETT
Attorney at Law,
License # 19896
E-1314 First Nat'l Bank Bldg
332 Minnesota Street
Saint Paul, MN 55101
(612) 227-5363

ATTORNEY FOR PETITIONER

STATUTES/RULES INVOLVED

RULE 803 (24), MINNESOTA RULES OF EVIDENCE:

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or

hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

MINNESOTA STATUTE, § 595.02, SUBD. 3:

595.02. Testimony of witnesses.

Subd. 3. Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally

impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement

notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-864

In The

Supreme Court of the United States

October Term, 1994

BRUCE PHILIP LARSON,

Petitioner,

v.

GERALD NUTT, Sheriff, Martin County,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

PAUL R. KEMPAINEN
Counsel of Record
Assistant Attorney General
Minn. Atty. Reg. No. 54987

1400 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 296-7573

GARY G. WOLLSCHLAGER
Martin County Attorney
Martin County Courthouse
Fairmont, MN 56031

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the Confrontation Clause allow admission of the out-of-court statements of a non-testifying child without a showing of "unavailability," where her statements otherwise meet the reliability requirements of *Idaho v. Wright*, under either a "firmly rooted" exception or a "particular guarantees of trustworthiness" analysis?

II. Whether an unavailability analysis is even relevant for admission of otherwise reliable out-of-court statements under the Confrontation Clause where the child witness was in fact produced at trial by the prosecution, unexpectedly found competent, and thus equally available to the defense had it chosen to call her for cross-examination?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. INTRODUCTION 7

II. THE EIGHTH CIRCUIT PROPERLY READ *WHITE V. ILLINOIS* AS DECLINING TO ADOPT AN UNAVAILABILITY RULE FOR ALL OTHERWISE ADMISSIBLE HEARSAY THAT CARRIES "SUFFICIENT INDICIA OF RELIABILITY," NOT JUST HEARSAY ADMITTED UNDER "FIRMLY ROOTED" EXCEPTIONS 8

III. THE LOWER COURT CASES CITED BY PETITIONER DO NOT REPRESENT A CLEAR SPLIT OF AUTHORITY OVER THE UNAVAILABILITY RULE REJECTED IN *WHITE V. ILLINOIS* 11

IV. THE FACTUAL SITUATION PRESENTED BY THIS CASE IS NARROW AND UNLIKELY TO RECUR ON ANY TYPE OF REGULAR BASIS .. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

MINNESOTA STATUTES

Minn. Stat. § 595.02, subd. 3 (1988) 3

FEDERAL DECISIONS

Coy v. Iowa, 487 U.S. 1012 (1988) 3, 13

Idaho v. Wright, 497 U.S. 805 (1990) 5, 9, 10

Larson v. Minnesota, 498 U.S. 801 (1990) 5

Larson v. Minnesota, ___ U.S. ___, 112 S. Ct. 965 (1992) 6

Larson v. Nutt, 34 F.3d 647 (8th Cir. 1994) 6

Lowry v. Collins, 988 F.2d 1364 (5th Cir. 1993) ...11, 12

Maryland v. Craig, 497 U.S. 836 (1990) 13

Ohio v. Roberts, 448 U.S. 65 (1980) 9, 10

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7, 8

Ring v. Erickson, 983 F.2d 818 (8th Cir. 1992) 8

United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992) 11

United States v. Inadi, 475 U.S. 387 (1986) 9, 14

United States v. Jacoby, 955 F.2d 1527 (11th Cir. 1992) 11

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) 11

Virgin Islands v. Joseph, 964 F.2d 1380 (3d Cir. 1992) 11

White v. Illinois, 500 U.S. 904 (1991) 5, 6

White v. Illinois, 502 U.S. 346 (1992) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

MINNESOTA DECISIONS

State v. Larson, 447 N.W.2d 593 (Minn. Ct. App. 1989), rev. granted (Minn. Dec. 15, 1989) 4

State v. Larson, 453 N.W.2d 42 (Minn. 1990), rehr'g denied (Minn. May 15, 1990) 5, 14

State v. Larson, 472 N.W.2d 120 (Minn. 1991) 5, 10

DECISIONS FROM OTHER JURISDICTIONS

State v. Wicker, 832 P.2d 127 (Wash. Ct. App. 1992) 12

OTHER AUTHORITIES

U.S. Sup. Ct. Rule 10.1 7

No. 94-864

In The

Supreme Court of the United States

October Term, 1994

BRUCE PHILIP LARSON,

Petitioner,

v.

GERALD NUTT, Sheriff, Martin County,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. The opinion of the Eighth Circuit Court of Appeals is reported at 34 F.3d 647 (8th Cir. 1994). A copy of the slip opinion is reproduced in the Appendix to the petition at pages B1-B7. ("Pet. App.")

STATEMENT OF THE CASE

This child sexual abuse case began on May 1, 1987, when B., a girl then less than four years old, reported

sexual contact by her father (petitioner Larson) to a physician's assistant during a medical examination at a family practice clinic (T. 172-177).[1] B. had previously complained of vaginal soreness and burning urination and was taken to the clinic for an exam by her mother (T. 172).

The physician's assistant conducting the exam observed redness and swelling around the vaginal opening (T. 173). The examiner, after first asking "Have you ever been touched there?" then asked B. "who" had touched her (T. 176). In response, B. said that "Daddy" had touched her with "his bone" that "came out of his pants" (T. 176-177). B. told the examiner that it had hurt and she had asked him to stop.

Subsequent investigation, which included three other out-of-court statements by B. to medical personnel and to investigators (one of which was a video-taped interview), led to a complaint being filed on December 15, 1987, charging petitioner with criminal sexual conduct against B.

Because of the prosecutor's good faith belief that B., because of her young age, was incompetent to testify, the State's professed intention from the beginning of the prosecution was to rely solely on the out-of-court statements of B. rather than calling her personally as a witness at trial (*e.g.*, 1st O.H. 3; 2d O.H. 4; T. 13-14, 154).[2] B. was

---

[1] "T." refers to the trial transcript.

[2] "1st O.H." refers to the transcript of the first omnibus hearing held on June 15, 1988. "2nd O.H." refers to the transcript of the reconvened omnibus hearing held on August 19, 1988.

only three years old at the time of the abuse, and had only recently turned five years old by the trial. Therefore, the prosecutor had serious concerns about her ability to remember and relate facts concerning the incident (1st O.H. 3; T. 33). These concerns were bolstered by the opinion of a psychotherapist (1st O.H. 3).

Prior to trial, at the June 15, 1988 omnibus hearing, petitioner moved to suppress the out-of-court statements made by B., on the ground that his right to confrontation would be denied. The parties assumed for purposes of the hearing that B. was incompetent. The trial court ruled that the out-of-court statements were reliable, corroborated, and admissible under Minn. Stat. § 595.02, subd. 3 (1988).[3]

At the August 19, 1988 reconvened omnibus hearing, petitioner renewed his motion to suppress B.'s out-of-court statements on constitutional grounds, based on this Court's then recent decision in *Coy v. Iowa*, 487 U.S. 1012 (1988). The trial court again denied petitioner's motion to suppress B.'s out-of-court statements, finding that *Coy* did not apply.

This remained the state of the evidentiary questions until August 30, 1988, the first day of trial. On that day petitioner informed the trial court that he intended to call B. as a witness (T. 14-16). Therefore, the trial court arranged a competency hearing in chambers before the trial would commence (T. 15). The trial court explained that "it is understood that neither party – if the Court

---

[3] The text of Minn. Stat. § 595.02, subd. 3 (1988) is set forth in Pet. App. F-2 to F-4.

finds [B.] competent . . . has to call her if they don't wish to do so" (T. 16).

B. was produced by the State for the competency hearing (T. 25). Despite the concerns of the State as to her ability as a witness (T. 15, 33, 38), B. was declared competent by the trial court (T. 45). However, in making its competency ruling, the trial court recognized that B.'s ability to remember was very limited (T. 44-45).

In any event, neither the State nor petitioner called B. as a witness during the course of the four-day trial. The State did not call her in accord with its professed concern whether B. had the ability to present any relevant evidence (T. 154). Instead, the State introduced B.'s out-of-court statements.[4] The defense failed to call B. for reasons not apparent in the record. However, petitioner did call twelve other witnesses, including petitioner himself (T. 459).

On September 3, 1988, the jury found petitioner guilty of criminal sexual conduct in the second degree (T. 664). On direct appeal the Minnesota Court of Appeals remanded the case, concluding that admission of B.'s out-of-court statements was prejudicial error if she had been properly ruled competent, but that the competency ruling therefore had to be re-examined in that light. *State v. Larson*, 447 N.W.2d 593, 598-599 (Minn. Ct. App. 1989), *rev. granted* (Minn. Dec. 15, 1989).

---

[4] Prior to commencement of the trial petitioner's defense counsel withdrew his Confrontation Clause objection to the video-taped interview of B., explaining: "because it is our desire that the video tape be admissible into evidence" (T. 9).

However, on further review by the Minnesota Supreme Court, the Court of Appeals was reversed and petitioner's conviction was affirmed. *State v. Larson*, 453 N.W.2d 42 (Minn. 1990), *rehr'g denied* (Minn. May 15, 1990) (*"Larson I"*).

A petition for a writ of certiorari was subsequently filed by petitioner with this Court. On October 1, 1990 an order was entered granting the petition for the purpose of remanding the case back to the Minnesota Supreme Court for further consideration in light of this Court's then recent decision in *Idaho v. Wright*, 497 U.S. 805 (1990). *Larson v. Minnesota*, 498 U.S. 801 (1990).

On remand, the Minnesota Supreme Court asked for further briefs and heard additional oral argument. On July 12, 1991 it filed its decision holding that: "After careful reconsideration of the case in light of *Wright*, we reaffirm the judgment of conviction." *State v. Larson*, 472 N.W.2d 120, 122 (Minn. 1991) (*"Larson II"*).[5]

Petitioner then filed a second petition for writ of certiorari in this Court on September 19, 1991. In that petition he specifically cited the case of *White v. Illinois*,

---

[5] Unfortunately, in petitioner Larson's statement of the case he incorrectly asserts that the Minnesota Supreme "court focused on the admissibility of the statements under the Minnesota Rules of Evidence, including the catch-all exception, . . . " (Petition at 8). While the Minnesota Supreme Court obviously had to deal with the evidentiary issues, it did not limit its focus to them. Rather, the Minnesota Court expressly addressed and decided all the Confrontation Clause issues raised by petitioner, particularly in *Larson II*, 472 N.W.2d at 123-128.

500 U.S. 904 (1991) (*cert. granted*), which was then pending before this Court.

On January 5, 1992, this Court decided the *White* case, holding that out-of-court declarations which bear "substantial guarantees of their trustworthiness" (such as those which come within firmly rooted exceptions to hearsay rule) are admissible under the Confrontation Clause without the need for a showing of unavailability. *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 742-43 (1992).

Twelve days later, on January 7, 1992, this Court denied petitioner's second request for a writ of certiorari in this case. *Larson v. Minnesota*, ___ U.S. ___, 112 S. Ct. 965 (1992).

Petitioner next filed a Petition for Writ of Habeas Corpus in the United States District Court. On October 22, 1993, the federal magistrate judge filed a Report and Recommendation that the writ be denied. Petitioner filed objections to the Report and Recommendation, but on November 23, 1993 the Honorable David S. Doty, Judge of United States District Court, issued an Order adopting the Report and Recommendation, and denying the application for a writ of habeas corpus.

An appeal to the Eighth Circuit followed. On September 1, 1994, the Eighth Circuit affirmed the district court's denial of relief. *Larson v. Nutt*, 34 F.3d 647 (8th Cir. 1994).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

The writ should be denied in this case because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.1. The questions presented by petitioner were correctly decided by the Eighth Circuit based upon a fair and reasonable reading of this Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), a decision in full accord with prior Confrontation Clause cases. Nor is there any clear split of authority among the lower courts over *White's* rejection of a general unavailability rule.

Further, the narrow factual situation presented by this case (where the very young child witness was actually "produced" at the courthouse by the prosecution, but where the defense nevertheless refused to call her for cross-examination) is so unique, and so unlikely to recur with any regularity, that it does not form the basis for any nationally important question.

The long procedural history of this case, through virtually every level of state and federal review, including two prior trips to this Court, amply demonstrates the care and correctness going into the result reached by the Eighth Circuit below. As such, this case simply does not give rise to a "substantial" federal question as defined by Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not

> sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Id. at 74.

The questions presented herein are already so well settled, and so based on the particular facts of this case, as to be deemed merely "academic" or "episodic" in nature. The petition should therefore be denied.

II. THE EIGHTH CIRCUIT PROPERLY READ *WHITE V. ILLINOIS* AS DECLINING TO ADOPT AN UNAVAILABILITY RULE FOR ALL OTHERWISE ADMISSIBLE HEARSAY THAT CARRIES "SUFFICIENT INDICIA OF RELIABILITY," NOT JUST HEARSAY ADMITTED UNDER "FIRMLY ROOTED" EXCEPTIONS.

In *White v. Illinois,* this Court declined to adopt a general unavailability rule for Confrontation Clause purposes. It did so because of the evidentiary value of all otherwise admissible hearsay statements which provide "substantial guarantees of trustworthiness," and thus "carry sufficient indicia of reliability." 502 U.S. at ___, 112 S. Ct. at 742, n.8, and 743. Under this reasoning, it simply makes no constitutional difference whether the hearsay fits either a "firmly rooted" or some other exception, so long as the statements are trustworthy and reliable.

The Eighth Circuit correctly recognized this principle both in the case at hand, and in its prior decision upon which it relied herein: *Ring v. Erickson,* 983 F.2d 818, 819-20 (8th Cir. 1992). The Eighth Circuit's decision

herein conforms with the basic proposition that so long as hearsay evidence is "trustworthy" and "reliable" it meets the basic concerns of the Confrontation Clause. *See Idaho v. Wright*, 497 U.S. 805, 815 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

A reading of *White* confirms this analysis The defendant in *White* had opposed introduction of the young victim's two out-of-court statements that were otherwise reliable because they came under firmly rooted exceptions to the hearsay rule, arguing that the Confrontation Clause required the prosecution to either produce the young girl, or demonstrate her unavailability. *White*, 502 U.S. at ___, 112 S. Ct. at 740. This Court, however, rejected defendant's proposed unavailability rule, stating that "[U]navailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *Id.* at 741, citing *United States v. Inadi*, 475 U.S. 387 (1986). This Court went on to hold that "trustworthy" statements, like those coming under the firmly rooted exceptions at issue, do not require an unavailability analysis, saying that:

> Given the *evidentiary value* of such statements, *their reliability* and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case differently from those we found admissible in *Inadi*.

White, 502 U.S. at ___, 112 S. Ct. at 743 (emphasis added).

In reaching its decision this Court based its analysis on the fact that the statements in question had sufficient "indicia of reliability" to meet the overall requirements of the Confrontation Clause. *Id.* at 742, n.8. Of course, they satisfied the reliability criterion because they came within "firmly rooted" hearsay exceptions. But nowhere does *White* limit its reasoning to that narrow category. Rather, it is the overall "reliability" requirement which is the key.

It is already well-established that "reliability" is not met solely by firmly rooted exceptions. Rather, this Court has made it clear in a number of cases that adequate indicia of reliability can be obtained by *either* a firmly rooted exception, *or* by "a showing of particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. at 815; *Ohio v. Roberts*, 448 U.S. at 66. Indeed, *White* itself was but an application of those principles in the particular context of the two firmly rooted hearsay exceptions at issue therein. *White*, 502 U.S. at ___, 112 S. Ct. at 743. Likewise, the Eighth Circuit correctly applied the same analysis to the out-of-court statements in the case at hand, agreeing with the Minnesota Supreme Court in *Larson II* that the relevant statements had particular guarantees of trustworthiness. Pet. App. B-5.

In sum, the questions presented herein are already decided, and there is no basis for further review by this Court.

III. THE LOWER COURT CASES CITED BY PETITIONER DO NOT REPRESENT A CLEAR SPLIT OF AUTHORITY OVER THE UNAVAILABILITY RULE REJECTED IN *WHITE V. ILLINOIS.*

In his petition at pages 14-17, petitioner cites a number of state and federal circuit cases for the proposition that "the issue presented in petitioner's case is a recurring one of national significance, involving a major disagreement about a rule of law." (Petition at 18-19). However, a careful reading of these cases actually reveals that they either contain only passing comments on *White* in the form of dicta, or are readily distinguishable on their facts from both *White* and the case at hand.

For example, both *United States v. Johnson*, 971 F.2d 562, 572 (10th Cir. 1992); and *United States v. Jacoby*, 955 F.2d 1527, 1538 (11th Cir. 1992), were business record cases not involving statements by victims of child sexual abuse. In both cases the business records were held admissible under the Confrontation Clause primarily because of their reliability, and *White v. Illinois* was cited only in dicta for the proposition that similar "reliability" was found in the firmly rooted exceptions at issue therein. Likewise, in *United States v. Accetturo*, 966 F.2d 631, 634 n.6 (11th Cir 1992), the court's footnote expressly stated that unavailability was not even an issue in that case, thus making the passing reference to *White* pure dicta. In any event, the *Accetturo* court's comment did not say that *White's* holding was limited only to firmly rooted exceptions. In *Virgin Islands v. Joseph*, 964 F.2d 1380, 1386 n.6 (3d Cir. 1992), unavailability was also not in issue (the out-of-court declarant being dead) and *White* was mentioned solely as a "note in passing." And in *Lowry v.*

Collins, 988 F.2d 1364 (5th Cir. 1993), it was found that the proffered out-of-court statement (a video-taped interview of the child witness) simply did *not* have the requisite "indicia of reliability" to make it admissible under the Confrontation Clause. *Id.* at 1370-71. *White* was cited only to distinguish the reliability of its statements from the unreliability of the video at issue in *Lowry*. *Id.* at 1371. It is therefore not surprising at all that the Fifth circuit required live testimony by the otherwise available child declarant therein.

Even *State v. Wicker*, 832 P.2d 127 (Wash. Ct. App. 1992), which appears on the surface to be most contrary to the Eighth Circuit's decision herein, is inapposite because the Washington Court of Appeals never even had to reach the constitutional issue. The hearsay evidence in *Wicker* had already been found not admissible under any exception to the hearsay rule by the court, 832 P.2d at 130, thus rendering that court's footnoted excursion into the Confrontation Clause, 832 P.2d at 130 n.7, an unnecessary dictum.

These examples show that there is no clear conflict among the lower courts over the legal principles in question. Thus, there is no basis for review by this Court.

IV. THE FACTUAL SITUATION PRESENTED BY THIS CASE IS NARROW AND UNLIKELY TO RECUR ON ANY TYPE OF REGULAR BASIS.

The instant case does not pose an important federal question because of its narrow and unusual set of facts.

The usual situation in cases of child sexual abuse finds the prosecution offering the testimony of the victim as the main pillar of its case. *See, e.g., Maryland v. Craig,* 497 U.S. 836 (1990); and *Coy v. Iowa,* 487 U.S. 1012 (1988). Indeed, given the heavy burden of proof placed upon the prosecution, the vast majority of prosecutors who have direct victim testimony available will usually make every attempt to put those victims on the stand because of its highly probative, not to say dramatic, impact.

On the other hand, it is usually the defense which attempts to prevent such evidence by arguing that the witness is incompetent, or making some other objection.

Here, however, the roles were reversed in a situation that is not likely to recur very often. The prosecution, supported by an expert's opinion, realized from the beginning that B. was the type of very young girl who would not be able to remember or relate at trial the abuse which she had earlier reported happened to her over a year before the trial (1st O.H. 3). Indeed, prior to trial, the defense and the trial court as well assumed her incompetent to testify and thus unavailable. Consequently, there was no thought prior to trial of holding a competency hearing.

But petitioner, in a surprise move on the first day of trial, announced his intention to possibly call B. as a witness (an intention that was not, in the event, fulfilled), thereby causing the trial court to hold a competency hearing. At the end of that hearing B. was unexpectedly found competent, although in finding her so the trial court recognized the strong possibility that B. may not be

able to remember anything (T. 45); and expressly told counsel that neither party had to call her (T. 16).

Given these circumstances it is hardly surprising that the prosecution continued with its planned strategy of not calling B. and instead relying upon other evidence, including B.'s otherwise admissible hearsay statements, to prove its case.

What is surprising, however, is the fact that petitioner did not call B. himself, even though she had been "produced" by the State and was made available for cross-examination by the trial court's competency ruling. As the Minnesota Supreme Court correctly recognized in *Larson I*, 453 N.W.2d at 45-46, this was an implicit admission by petitioner that the utility of confronting B. at trial was too remote to invoke constitutional concern over her "availability," citing *United States v. Inadi*, 475 U.S. 387, 396-98 (1986).

Clearly, this case presents a very narrow, if not unique, set of facts. Because it is highly unlikely to recur on any sort of regular basis, the question is not an important one for this Court to review.

CONCLUSION

For all the above reasons, respondent respectfully asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Minnesota Attorney General

PAUL R. KEMPAINEN
Counsel of Record
Assistant Attorney General
Minn. Atty. Reg. No. 54987

1400 NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101
(612) 296-7573

GARY G. WOLLSCHLAGER
Martin County Attorney
Martin County Courthouse
Fairmont, Minnesota 56031

Counsel for Respondent